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MAHASIN YAZIR MAHAMAD YUSOFF

v.

PP

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: D-05-89-2004]

C

12 AUGUST 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 22.88gm of heroin - Drugs found in a plastic container on rear seat of car - Element of knowledge - Whether established - Whether there was a prima facie case of possession under s. 12(2) Dangerous Drugs Act 1952 - Whether accused failed to raise reasonable doubt relating to control or custody of drugs - Whether there was failure to rebut the presumption of possession under s. 37(d) Dangerous Drugs Act 1952 on a balance of probabilities*

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The appellant ('the accused') was charged with trafficking in 22.88 gm of heroin at the Customs Complex, Kelantan ('the Customs Complex') under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) thereof. At the close of the prosecution's case, the trial judge held that the prosecution had failed to prove the original charge under s. 39B(1)(a), but found that there was a *prima facie* case of possession as amended under s. 12(2) read with s. 39A(2). The accused was convicted and sentenced to 18 years' imprisonment and 12 strokes of whipping. This was the appeal of the accused against the conviction and sentence. Briefly, the facts were that PW6 and PW5 had detained a car driven by the accused. In the presence of the accused, PW6 had examined the car and found a plastic container (exh. P19) on the rear seat thereof that when opened revealed 30 transparent bottles. The accused was arrested and the contents in the said transparent bottles were sent to the chemist who confirmed that it contained 22.88 gm of heroin. The accused's defence was that it was a friend of his by the name of Fendi who had put the container on the rear seat and had asked the accused to give the container to Fendi's brother in Kuala Terengganu. It was the contention of the defence herein that the prosecution's evidence had not established that the accused had knowledge of the things on the rear seat of the car.

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Held (dismissing the appeal; affirming High Court decision)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) There was no misdirection by the trial judge in finding a *prima facie* case of possession under s. 12(2). By way of rehearing and in consideration of the defence evidence, that the accused had rented the car and that it was Fendi who had put the container on the rear seat thereof, it was noted that the defence cross examination of the relevant prosecution witnesses had never covered the rented car nor adverted to the existence of Fendi at all. Hence, there were good reasons for the trial judge to reject the defence as an afterthought or a recent invention (*Alcontara Ambross Anthony v. PP*). Upon the rejection of the defence evidence, the accused had failed to raise any reasonable doubt relating to the control or custody of the drugs in question at the material time, and had also failed to rebut the presumption of possession under s. 37(d) on a balance of probabilities. (paras 12-19)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('tertuduh') dituduh mengedar dadah 22.88 gm heroin di Kompleks Kastam, Kelantan ('Kompleks Kastam') di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan dihukum di bawah s. 39B(2). Di akhir kes pendakwaan, hakim bicara memutuskan bahawa pendakwaan gagal membuktikan pertuduhan original di bawah s. 39B(1)(a), tetapi mendapati bahawa terdapatnya kes *prima facie* milikan seperti yang dipinda di bawah s. 12(2) dibaca dengan s. 39A(2). Tertuduh disabitkan dan dihukum penjara selama 18 tahun serta 12 sebatan. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Fakta-faktanya adalah PW6 dan PW5 telah menahan sebuah kereta yang dipandu oleh tertuduh. Dengan kehadiran tertuduh, PW6 telah memeriksa kereta tersebut dan mendapati satu bekas plastik (eks. P19) di atas tempat duduk bahagian belakang kereta dan apabila dibuka mengandungi 30 botol-botol telus. Tertuduh ditangkap dan kandungan-kandungan di dalam botol-botol telus itu dihantar ke ahli kimia yang mengesahkan bahawa ia mengandungi 22.88 gm heroin. Pembelaan perayu adalah bahawa kawannya yang bernama Fendi yang telah meletakkan bekas plastik tersebut ke atas tempat duduk belakang kereta dan telah meminta tertuduh membawa bekas plastik tersebut kepada abang Fendi di Kuala Terengganu. Ia adalah hujahan pihak pembelaan bahawa keterangan pendakwaan tidak membuktikan bahawa tertuduh mempunyai pengetahuan tentang barang-barang yang berada di tempat duduk belakang kereta.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara tidak tersalah arah apabila memutuskan bahawa terdapat satu kes *prima facie* milikan di bawah s. 12(2). Dengan mendengar balik dan dalam mempertimbangkan keterangan pembelaan, bahawa tertuduh telah menyewa kereta tersebut dan ia adalah satu Fendi yang telah meletakkan bekas plastik ke atas tempat duduk belakang kereta, ia dinyatakan bahawa semasa pembelaan soal balas saksi-saksi pendakwaan yang relevan tidak menyentuh mengenai kereta sewa atau merujuk kepada kewujudan Fendi langsung. Oleh itu, terdapat beberapa alasan yang bagus untuk hakim bicara menolak pembelaan sebagai suatu perkara yang difikirkan kemudian atau benda yang baru sahaja direka (*Alcontara Ambross Anthony v. PP*). Dengan penolakan keterangan pembelaan, tertuduh gagal membangkitkan apa-apa keraguan munasabah berhubungan dengan kawalan atau jagaan dadah-dadah tersebut pada masa yang material itu, dan telah gagal mematahkan anggapan milikan di bawah s. 37(d) atas imbangan kebarangkalian.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Erwin Hardy & Anor [2007] 9 CLJ 334 HC ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Zulkifli Arshad v. PP [2007] 6 CLJ 77 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 12(2), 37(d), 39A(2), B(1)(a), (2)

For the appellant - Karpal Singh (Ram Karpal Singh with him); M/s Karpal Singh & Co
For the respondent - Eddie Yeo Soon Chye DPP

[Appeal from High Court, Kota Bharu; Criminal Trial No: 45-8-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appellant ("the accused") was charged with trafficking in 22.88gm of heroin at the Customs Complex, Kg. Bagus, Rantau Panjang, Pasir Mas, Kelantan ("the Customs Complex"), under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) thereof. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated).

[2] At the close of the prosecution's case, the learned trial judge held that the prosecution had failed to prove the original charge under s. 39B(1)(a), but found that there was a *prima facie* case of possession as amended under s. 12(2) read with s. 39A(2). The accused was convicted and sentenced to 18 years imprisonment and 12 strokes of whipping.

[3] This is the accused's appeal against the conviction and sentence.

Finding Of Facts

[4] The facts as found by the learned trial judge reveal that upon information received, on 16 August 2002, at about 3pm, C/Insp. 1249 Mohd Zulhazi Mohd Zulkifli (PW6) led a police party to patrol Rantau Panjang in order to spot a Kancil car bearing registration No. TW 5752 ("the car") which PW6 had duly spotted. The accused was driving the car towards the direction of the Customs Complex. PW6 and his men trailed the car and, at the same time, contacted L/Cpl. Shaharuddin bin Shafie (PW5), who was on duty at the Customs Complex, to detain the car.

[5] On detaining the car, PW5 obtained the accused's driving licence and identification documents. The accused was the driver and alone in the car. PW5 asked the accused to turn off the engine of the car.

[6] Shortly later, PW6 and his men arrived at the customs complex where PW6 instructed three of his men to guard the accused. PW6 searched the accused's body, but found nothing incriminating.

[7] In the presence of the accused, PW6 examined the car, and saw a plastic container (exh. P19) on the rear seat thereof. PW6 ordered the accused to take out the container. Initially, the accused was hesitant. Eventually, the accused did as ordered, and handed it over to PW6. PW6 shook the container, and heard the sound of hard substances in it. By means of a 'V' cut, PW6 opened the container and found, *inter alia*, 30 transparent bottles. PW6 seized all the exhibits and arrested the accused. The accused looked frightened and was shivering.

[8] PW6 brought the accused and all the exhibits to the police station where PW6 made a police report. PW6 initialled and marked the 30 transparent bottles as exh. P12(1) - P12(30). He handed the accused and all the exhibits to the Investigating officer, Insp. Salari bin Mat Hassan (PW8).

[9] The contents in the 30 transparent bottles were sent to the Chemist Zainun bt Mohamad (PW3) for chemical analysis, and were found to contain 22.88gm of heroin.

[10] The accused had rented the car from the owner (PW4) in Kuala Terengganu, some five hours before the accused was arrested in Rantau Panjang. PW4 testified that before he rented the car to the accused on 16 August 2002, he had washed it, found nothing in it and then locked it.

[11] The accused's defence unfolded that he stayed with his family in Kuala Terengganu. On 16 August 2002, at about 9am, he received a telephone call from his two-month acquaintance, one Fendi, who invited him to go to Rantau Panjang to meet Fendi's son and wife who is a Thai national. Fendi asked the accused to rent a car and Fendi would pay the rental. At about 9.50am, at a petrol station, Fendi fetched the accused on a motorcycle and proceeded to Batu Buruk. On the way, Fendi suggested that the accused rent the same car which Fendi had rented some three days earlier. On arrival at the car park at about 10am, Fendi alighted from the motorcycle and gave the accused the money to pay for the car rental. Fendi then returned home. Having rented the car, the accused proceeded to fetch Fendi. At Fendi's request, the accused and Fendi went to the house of Fendi's brother in Kuala Terengganu, to collect some money from Fendi's brother for the purpose of buying some goods in Rantau Panjang. The accused and

Fendi left for Rantau Panjang at about 11am. They arrived at Rantau Panjang at about 1.30pm. Fendi told the accused that he (Fendi) wanted to go to Golok to see his wife and son there. Fendi stopped the accused from following. At about 2.30pm, Fendi phoned and asked the accused to wait in the car. Five minutes later, Fendi arrived and informed the accused that he (Fendi) could not return with the accused as Fendi's son was sick. Fendi then opened the rear door of the car and put a container (exh P19) on the rear seat. Fendi asked the accused to give the container to Fendi's brother in Kuala Terengganu. At 2.55pm, the accused set out alone to return to Kuala Terengganu. On arrival at the Customs Complex, the accused was detained by the police. The accused was asked to alight from the car. Some ten minutes later, a police party arrived, and recovered the container from the rear seat of the car.

Decision Of High Court

[12] At the close of the prosecution's case, the learned judge found that the accused had in his custody or under his control the container at the material time; and invoked the presumption of possession under s. 37(d). He held that the prosecution had established a *prima facie* case of possession under s. 12(2), punishable under s. 39A(2). He amended the charge and ordered the accused to enter on his defence. Having considered the evidence in its entirety at the close of the defence case, the learned trial judge rejected the defence, holding that it was an afterthought or a recent invention, as the issue of the rented car and the existence of Fendi was never put to the relevant prosecution witnesses in the course of cross-examination.

Knowledge

[13] Learned defence counsel Mr Karpal Singh (assisted by Mr Ram Karpal Singh) contended that the prosecution's evidence has not established that the accused had knowledge of the things on the rear seat of the car. They cited the following authorities:

(1) *Zulkifli Arshad v. PP* [2007] 6 CLJ 77 CA;

(2) *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 FC;

(3) *PP v. Erwin Hardy & Anor* [2007] 9 CLJ 334 HC; and

(4) *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264 CA

[14] Mr Eddie Yeo Soon Chye, learned deputy public prosecutor, responded that the learned trial judge had rightly called on the accused to enter on the defence and convicted the accused under the amended charge.

[15] At this juncture, it is appropriate for us to consider the defence authorities which relate to the recovery of the relevant exhibits positioned in a car, as follows:

(1) In Zulkifli bin Arshad, *supra*, the police party recovered a black NIKE bag containing 5,796.7gm of cannabis from the accused's car. The accused was the driver. He was charged, *inter alia*, with trafficking. In the High Court, the accused was convicted and sentenced to death. On appeal, the charge was amended to one of possession under s. 6, punishable under s. 39A(2). We are unable to see to how the accused could garner any support from this authority.

(2) The relevant facts in *Abdul Rahman Akif*, *supra*, reveal that one package was found under the driver's seat and two packages under the front passenger's seat in the car driven by the accused. The packages were found to contain 4,826gm of cannabis. The defence was that although he knew of the existence of the three packages in the car, he had no knowledge that they contained drugs. In the High Court, the accused was convicted of trafficking and sentenced to death, but on appeal, the conviction and sentence were set aside, and substituted with a conviction under s. 6, punishable under s. 39A(2). However, on further appeal, the Federal Court restored the entire decision of the High Court. We are of the view that this Federal Court authority militates against the defence contention.

(3) In *Erwin Hardy & Anor, supra*, both the accused were arrested upon the recovery of the drugs from the car they were travelling in. The first accused was the driver while the second accused was the passenger. They did not own the car. There was evidence that the car was rented to one "Din" who was not produced as a witness. Both the accused were charged with trafficking under s. 39B(1)(a). Hamid Sultan Abu Backer JC held that the prosecution had failed to establish a *prima facie* case of trafficking, but exercised his discretion to amend the

charge to one of possession under s. 12(2). Upon reflection, we are unable to see how the accused in the instant appeal could derive any assistance from this authority.

(4) *Surentheran Selvaraja*, *supra*, concerns the recovery by the police of a plastic bag which contained 40 small packets of drugs in a car driven by the accused. The bag was found in between the accused's feet below the driver's (the accused's) seat. The sessions court convicted the accused of possession under s. 12(2), punishable under s. 39A(2). This was affirmed by the High Court and this court. Again, we find that this authority is detrimental to the accused.

[16] In the light of our analysis of the defence authorities, and having carefully considered the defence contention, we are unable to identify any misdirection by the learned trial judge in finding a *prima facie* case of possession under s. 12(2).

Afterthought Or Recent Invention

[17] By way of rehearing and in our consideration of the defence evidence, that the accused had rented the car and that it was Fendi who put the container (exh. P19) on the rear seat thereof, we note that defence cross-examination of the relevant prosecution witnesses had never covered the rented car nor adverted to the existence of Fendi at all. Hence, there were good reasons for the learned trial judge to reject the defence as an afterthought or a recent invention. The rejection is consistent with the approach adopted in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, where the Federal Court through the judgment of Edger Joseph Jr FCJ (as he then was) explained as follows:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention - in other words, 'kept up its sleeve', as it were - and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence.

A **[18]** We hold that upon the rejection of the defence evidence, the accused had failed to raise any reasonable doubt relating to the control or custody of the drugs in question at the material time, and has also failed to rebut the presumption of possession under s. 37(d) on a balance of probabilities.

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Conclusion

[19] In the circumstances, the appeal against conviction and sentence is dismissed. The decision of the High Court is affirmed.

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